In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 217

STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

MOTION TO AFFIRM

Pursuant to paragraph 1(c) of Rule 16 of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a judgment of a three-judge district court, which dismissed appellant's complaint challenging an order entered on July 31, 1962, by the Interstate Commerce Commission. The Commission's order, issued under Section 13(4) of the Interstate Commerce Act, required railroads operating in Kansas to increase *intrastate* freight rates

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and charges on certain specified commodities to the same extent as the *interstate* rates on these commodities had been previously increased pursuant to the Commission's approval in two nationwide revenue proceedings.

The purpose of the Commission's order is to require the intrastate traffic on these commodities to contribute its fair share of the carriers' revenue needs. The detailed findings upon which the order is based appear in the Commission's report dated December 1, 1961, *Kansas Intrastate Freight Rates and Charges,* 315 I.C.C. 223 (J.S. 22–57).

The nationwide revenue cases which form the background of this litigation are designated as *Ex Parte No. 206, Increased Freight Rates, E. and W. Territories, 1956,* 299 I.C.C. 429, and *Increased Freight Rates , E., W., and S. Territories, 1956,* 300 I.C.C. 633; and *Ex Parte No. 212, Increased Freight Rates, 1958,* 302 I.C.C. 665, and 304 I.C.C. 289. In Ex Parte No. 206, the Commission, on August 6, 1957, authorized a general increase of 12 percent, with exceptions, in the freight rates and charges for interstate transportation within western territory. (J.S. 24–25, 56.) In Ex Parte No. 212, the Commission on September 9, 1958, authorized certain additional increases in interstate rates and charges. (J.A. 25–26, 56.)

Following these nationwide increases, the thirteen principal railroads operating in Kansas[1] petitioned

[1] These railroads are: The Atchison, Topeka and Santa Fe Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago, Rock Island and Pacific Railroad Company; The Garden City Western Railway Company; The Kansas City Southern Railway Company; Kansas City Terminal Rail-

the State Corporation Commission of Kansas for authority to adopt corresponding increases in rates for intrastate transportation within Kansas. The Kansas commission, while authorizing most of these increases, excepted certain commodities. (J.S. 25.)[2] On October 26, 1959, the same carriers sought relief from the Interstate Commerce Commission to the extent that it had been denied by the Kansas commission.

Pursuant to Section 13(4) of the Act, the Commission instituted an investigation into the lawfulness of the Kansas intrastate freight rates and charges covering the excepted commodities. All railroads operating in Kansas subject to the Commission's jurisdiction were made respondents in this proceeding. Copies of the order of investigation and notice of hearing were also served on the State of Kansas and the Kansas commission. (J.S. 23–24.)

In its decision, the Commission found that the

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way Company; Kansas, Oklahoma & Gulf Railway Company; Midland Valley Railroad Company; Missouri-Kansas-Texas Railroad Company; Missouri Pacific Railroad Company; Northeast Oklahoma Railroad Company; St. Louis-San Francisco Railway Company; and Union Pacific Railroad Company.

[2] The commodities refused increases corresponding to Ex Parte No. 206 are: sand; gravel; crushed stone, including chat; building aggregates, including expanded clay or shale cinders; agricultural limestone; brick; clay sewer pipe; clay drain pipe and related articles; bituminous coal; petroleum and petroleum products, including liquified petroleum gas; and cement. The commodities refused increases corresponding to Ex Parte No. 212 are: sand; gravel; crushed stone; chat; road aggregates; lightweight building aggregates; agricultural limestone; brick; clay sewer pipe, drain tile and related articles; bituminous coal; petroleum and petroleum products, and hay.

intrastate freight rates and charges on crushed stone, sand, gravel, road aggregates, chat, and agricultural limestone; clay draintile, clay sewer pipe, and related articles; lightweight building aggregates, including expanded clay or shale cinders, hay, and petroleum and petroleum products are abnormally low; are not contributing their fair share of the revenues required by the carriers; and, to the extent that these rates are lower than present interstate rates, they cause, and for the future will cause, undue, unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It further held that the new intrastate rates would increase the revenues of the railroads by substantial amounts.

As to intrastate rates on bituminous coal, refractories and related articles, the Commission found, on the other hand, that the present rates would not unduly burden interstate commerce (J.S. 53–54), because there was no basis for concluding that the increased rates would provide a net revenue gain. (J.S. 42, 45.)

The district court, after a careful review of the evidence (J.S. 8–14), unanimously concluded that the Commission's findings were supported by substantial evidence (J.S. 15). Appellant contends, as it did below, that the lower Kansas intrastate rates were not an undue burden upon interstate commerce because higher intrastate rates would divert traffic from the railroads. The district court noted that railroad witnesses familiar with the rates and revenues of the railroads involved had persuasively testified that, while there might be some traffic diversion because of

increased rates, the net result would be increased revenues (J.S. 14). In the opinion of the court, the conclusion of the Commission was based upon "substantial evidence" and "supporting data" (J.S. 7).

ARGUMENT

This case presents no substantial question warranting plenary consideration by this Court.

1. Appellant argues (J.S. 5–10) that the evidence does not support the Commission's finding as to the effects which the increases will have on carrier revenues. The court below, however, carefully reviewed the evidence (J.S. 8–14)—consisting of detailed traffic data analyzed by expert witnesses—and concluded that the findings were adequately supported in the record. There is no occasion for further review of these factual issues. *Radio Corporation of America* v. *United States,* 341 U.S. 412, 420; *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490–491; *United States* v. *Pierce Auto Freight Lines, Inc.,* 327 U.S. 515, 536.

2. Appellant suggests that the trial court, in determining the substantiality of the evidence to support the order, misconceived the scope of judicial review contemplated by Section 10(e) of the Administrative Procedure Act, 5 U.S.C. 1009(e). It says, in this connection, that the court looked only to evidence supporting the Commission's order, and did not consider the cross-examination, the findings of the trial examiner, and opposing testimony. (J.S. 6.)

Appellant, it is to be noted, does not question that the Commission, in its report, considered the opposing

testimony presented (J.S. 33–35, 36–38, 43–50); the cross-examination (J.S. 26–27, 50–51); and the findings of the trial examiner (J.S. 23, 27).[3] Moreover, the claim that the district court looked at only one side of the picture is refuted by the opinion below. Thus, the court quotes a portion of the cross-examination (J.S. 9–10); refers to the examiner's rulings on evidentiary points raised by appellant (J.S. 7); and specifically discusses appellant's contention as to possible diversion of traffic resulting from increased rates (J.S. 6, 7, 8, 14). It clearly appears that it examined the sufficiency of the evidence on the record considered as a whole.

3. Appellant urges finally that the court below erred in holding (1) that the 1958 amendments to Section 13(4)[4] made it unnecessary to consider the effect that an increase in rates might have upon the volume of the intrastate movement of a commodity, and (2) that the 1958 amendments permit the Com-

[3] The care with which the Commission scrutinized the evidence is shown by its treatment of the commodities for which increases were not authorized. With respect to refractories and related articles, the increases were rejected because of a complete failure of proof regarding intrastate shipment (J.S. 42). The proposed increases in rates for bituminous coal were rejected on the basis of substantial evidence that the increases would not only result in undue diversion to competing modes of transportation but would also result in decreased consumption of coal *vis-a-vis* other fuels (J.S. 44–45).

[4] The 1958 amendments followed the decisions of this Court in *Chicago, Milwaukee, St. P. & P. R. Co.* v. *Illinois*, 355 U.S. 300, and *Public Service Commission of Utah* v. *United States*, 356 U.S. 421. The lower court decision interpreting these amendments, *Utah Citizens Rate Association* v. *United States*, 192 F. Supp. 12 (D. Utah), was affirmed by this Court, *per curiam*, 365 U.S. 649.

mission to base a finding that increased intrastate rates will result in a net gain in revenue upon the testimony of railroad traffic officers that revenues generally have increased following past general increases in freight rates. Obviously, however, there is no occasion to decide in this case whether the Commission must find that increased intrastate rates will increase the carriers' net revenues. The Commission specifically found that the increases ordered "will result in a substantial increase in the [railroads'] revenues" (J.S. 51). It also disallowed increases in instances where the prospect of increased revenues was not shown. (J.S. 42, 45.)

Moreover, the Commission's determination was not based upon a view that the 1958 amendments had relaxed evidentiary requirements in this respect. The Commission found that the informed judgment of railroad traffic officers, *i.e.*, their testimony that there would be an increase in revenues, was entitled to considerable weight, citing *United States* v. *Louisiana*, 290 U.S. 70, 80; *State of South Carolina* v. *United States*, 136 F. Supp. 897, 899–902 (E.D.S.C.), affirmed, 351 U.S. 944; and *State of Alabama* v. *United States*, 141 F. Supp. 488 (N.D. Ala.) (J.S. 51). The Commission also observed that the statements of these railroad witnesses that a net gain in revenue would result were supported by data which they submitted (J.S. 51.) The district court, in turn, pointed out that the evidence on which the Commission based its conclusion that an increase in intrastate rates would not substantially divert traffic from the railroads, but would increase their revenues without an appreciable

increase in expenses, was both documentary and direct. (J.S. 8.) After reviewing this evidence in detail (J.S. 8–14), the court concluded that these witnesses, "* * * representing the railroad systems operating in Kansas, and familiar with the traffic rates and revenues of the various companies, testified with certainty that while there might be some diversion of traffic (by reason of the increase in rates) the net result of the increase of rates would be to substantially increase revenues. * * *" (J.S. 14). Since the court below held in substance (J.S. 7) that the Commission's findings were based upon evidence which was substantial under the pre-1958 cases, this case does not present the question whether the amendments of that year relaxed pre-existing evidentiary requirements.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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